THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MUKONO

HCT-03-CR-SC-0085 OF 2010

THE REPUBLIC OF UGANDA :::::::::::::::::::::::::::: PROSECUTOR

VERSUS

SEBULIBA MUSA :: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

Sebuliba Musa was indicted for defilement **C/S 129 (1) of the Penal Code Act.** The particulars of the offence alleged that the accused on 23rd March, 2007 at Wamponge Kiwngala in Kayunga District had unlawful sexual intercourse with Nansereko, a girl under the age of 18 years.

Upon being arraigned on the indictment, the accused denied the offence thereby putting in issue all the essential ingredients of the offence of defilement for the prosecution to prove beyond all reasonable doubt.

Proof beyond reasonable doubt: See **WOOLMINGTON vs DPP [1935] A-C 462.**

Proof beyond reasonable doubt generally means the Court must subject the entire evidence to such scrutiny as to be satisfied beyond reasonable doubt that

all the important elements placed on the prosecution by the substantive law are proved. If Court is not satisfied the accused person must be acquitted: See **Criminal Session No. 30 of 2006, Uganda v Dr. Aggrey Kiyingi.**

Proof beyond reasonable doubt however does not mean proof beyond the shadow of doubt. A clear distinction made on what exactly is proof beyond reasonable doubt means was explained by **Lord Denming in MILLER v Minister of Pension [1947] 2 ALLER 372, 373:**

> *"Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility in his favour..... the case is proved beyond reasonable doubt but nothing short of that will suffice."*

Ingredients of the offence:

The following ingredients have to be proved beyond all reasonable doubt:-

(1) That the girl victim was below 18 years of age.

(2) That the victim experienced penetrative sexual intercourse.

(3) That the accused participated in the sexual intercourse: See **Bassita Husain v Uganda Supreme Court Criminal Appeal No. 35 of 1995 (Unreported).**

In an attempt to prove the above ingredients the prosecution adduced the evidence from **Pw_1 Mukasa Ibrahim**, who was the father of the victim and **Pw_2 Nansereko Madina** the victim.

As far as age of the victim is concerned Pw_1 Mukasa Ibrahim testified that the victim was born on 3rd November, 2002 at 9.00 p.m. He is the biological father of the victim. That meant that at the time of the incident the victim was 4 years old. The victim corroborated. The above evidence when she stated that she was 7 years old at the time she was giving her testimony. By mere looking at the victim I found her to be visibly young and could not therefore in my wisdom hesitate to conclude that she was of a very, very tender age. The defence applied the same wisdom and common sense and also concluded that the victim was a girl clearly below 18 years of age.

With regard to sexual intercourse, the prosecution was under a duty to prove that the victim had been penetrated however slight it was. Proof of penetration is normally by the victim's evidence, medical evidence and any other cogent evidence: See **Bassita Hussain (Supra).** Nansereko Madina Pw_2 testified that on the material date the accused found her at her grandmother's place where she was staying. Her grandmother had gone to the borehole to fetch water. The accused told her to remove her knickers and put it on the window. From there the accused touched her private parts. Mukasa Ibrahim Pw_1 who was the victim's father testified that on the material date he returned from Safari together with his young brother called Hussein Busulwa. The victim welcomed them and told them that the accused had had sexual intercourse with her. That the victim was limping and did not come running to welcome them. He immediately took the victim to Kayunga Hospital for medical examination where it was confirmed that she had been defiled.

In the instant case medical evidence was not conclusive because it was not tendered in as exhibit but merely for identification. However, from the evidence of the victim I am satisfied that she experienced an act of sexual intercourse. She appeared to know what sexual act constituted. She appeared to be a truthful girl and was quite consistent when she reported the act immediately to her father Mukasa Ibrahim Pw_1. According to Mukasa Ibrahim, the victim appeared in a poor and an unusual mood and she immediately reported that the accused had performed sexual act on her. She was also limping. In conclusion I find that the victim's evidence was corroborated by that of Mukasa Ibrahim Pw_2 and her own distressed condition. It is therefore my conclusion that proof of sexual intercourse was established beyond reasonable doubt.

As for participation of the accused the prosecution relies on the evidence of the complainant and that of the victim.

Mukasa Ibrahim Pw_1 who was the complainant in this case testified inter alia that on the material date the victim reported to him that the accused had defiled her. The victim herself testified that the accused had sexual intercourse with her from the home of her grandmother. By that time her grandmother had gone to fetch water from a borehole. She testified that she reported the incident to her grandmother upon her return but she did nothing.

The accused made a sworn defence of total denial and alibi.

It must be noted that the victim knew the accused very well. In fact they were staying together and were related. The incident took place during broad day light. She stated that she reported the incident to her grandmother who took no action. I am not amused because Sara Namala Dw_2 who testified in defence of

the accused being her mother denied that the offence took place. It is possible that she was protecting her son more than grandchild. However the victim was emphatic that it was the accused who had sexual intercourse with her. She reported the incident to her father Ibrahim Mukasa. The evidence of the two witnesses did place the accused at the scene and destroyed all the defences the accused relied on total denial, alibi and grudge. I find that the accused being uncle to the victim had access to her and had opportunity to sexually abuse her because the victim's grandmother had gone to fetch water leaving in the victim alone with the accused. Also the conduct of the accused of hiding and running away from arrest was not that of an innocent person. In conclusion I find that the prosecution has proved all the ingredients of this offence beyond reasonable doubt and therefore find the accused guilty as charged and he is convicted accordingly.

HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE
8/11/2010

9/11/2010

Accused present.
Mr. Masede present.
Mr. Seryazi for the accused.
Judgment red in Court.

Mr. Masede: I have no previous record. However I pray that a deterrent sentence be given to serve as an example because this offence is rampant here

also he exposed the victim to sexual intercourse at an early age as to cause her to hate the act for life.

Mr. Ssenkumba: He has spent four (4) years on remand. By the time of the offence he was only 17 years old. He could be excused because he was overwhelmed by the energy of his youth four (4) years be considered enough for him to have learnt to play with young children. He has potential to serve a useful citizen. Let this court grant him a chance. We so pray.

Allocolus: I pray for leniency. I have learnt my lesson. I will not do it again. That is all.

SENTENCE

This offence is rampant in the area. The accused is related to the victim being the child of his brother. At the time of the incident the accused was 17 years old according to the charge sheet and medical examination report. He was therefore more or less a child. Court should also consider that there is need to mend relationship within the family. The extent of the damage on the victim is unknown because no medical report was available. The accused is still lying with a lot of potential. Considering that he has spent already four (4) years in custody and learnt his own lesson, the accused is therefore sentenced to two years imprisonment.

Right of Appeal explained.

HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE

9/11/2010